§ 655.737 concerning exempt H–1B nonimmigrants, in the event that such entity seeks to hire new H–1B nonimmigrant(s) or to extend the H–1B status of existing H–1B nonimmigrants. (See § 655.736(d)(6).)

[65 FR 80212, Dec. 20, 2000]

§ 655.731 What is the first LCA requirement, regarding wages?

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay the H–1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H–1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. ''Legitimate business factors,'' for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.,* they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.,* cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(*1*) Where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial ''cap'' in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another

source for wage information (*e.g.*, Bureau of Labor Statistics' Occupational Employment Statistics Survey).

(*2*) Except as provided in paragraph (a)(2)(i)(B)(*1*) of this section, for purposes of the determination of the H–1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a worker is employed on a contract subject to the SCA or whether the worker would be exempt from the SCA through application of the SCA/FLSA ''professional employee'' exemption test (*i.e.*, duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H–1B employee(s) to perform services under an SCA-covered contract may find that the H–1B employees are required to be paid the SCA rate as the H–1B prevailing wage even though non-H–1B employees performing the same services may be exempt from the SCA.

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) or (ii) of this section, the prevailing wage shall be the weighted average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination*. Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation. This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will determine the prevailing wage using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage, which shall in no event be for less than 90 days or more than one year from the date of the SESA's issuance of the determination.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See subpart E of 20 CFR part 658. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior

to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vii) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*i.e.*, either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H–1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) through (iii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(viii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity , a nonprofit research organization, or a Governmental research organization as these terms are defined in 20 CFR 656.40(c), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(ix) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

(3) Once the prevailing wage rate is established, the H–1B employer then shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H–1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H–1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis (*e.g.*, hourly, piecerate; commission); or

(B) With respect only to H–1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

(vi) Total additions to or deductions from pay each pay period, by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.

(viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):

(A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.*, summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);

(B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;

(C) Evidence as to what benefits are actually provided to U.S. workers and H–1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;

(D) For multinational employers who choose to provide H–1B nonimmigrants with ''home country'' benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H–1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c). Such documentation shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (*see* 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (*see* 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (b)(3)(ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(*1*) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination. For purposes of this paragraph (b)(3)(iii)(C), a prevailing wage provided by another legitimate source of such wage information shall be one which:

(*1*) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Is based on the most recent and accurate information available; and

(*3*) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) ''Cash wages paid,'' for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.*, an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (*i.e.*, unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.*, they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.*, recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.*, cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H–1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits ''on the same basis, and in accordance with the same criteria'' means that the employer shall offer H–1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more

strict eligibility or participation requirements for the H–1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.*, full-time workers compared to full-time workers; professional staff compared to professional staff). H–1B nonimmigrants are not to be denied benefits on the basis that they are ''temporary employees'' by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H–1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H–1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H–1B nonimmigrant(s).

(ii) The benefits received by the H–1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), *provided that* the H–1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (*e.g.*, elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits) or, in those instances where the employer is part of a multinational corporate operation, the benefits received by the H–1B nonimmigrant are provided in accordance with an employer's practice that satisfies the requirements of paragraph (c)(3)(iii)(B) or (C) of this section. In all cases, however, an employer's practice must comply with the requirements of any applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17).

(iii) If the employer is part of a multinational corporate operation (*i.e.*, operates in affiliation with business entities in other countries, whether as subsidiaries or in some other arrangement), the following three options (*i.e.*, (A), (B) or (C)) are available to the employer with respect to H–1B nonimmigrants who remain on the ''home country'' payroll.

(A) The employer may offer the H–1B nonimmigrant(s) benefits in accordance with paragraphs (c)(3)(i) and (ii) of this section.

(B) Where an H–1B nonimmigrant is in the U.S. for no more than 90 consecutive calendar days, the employer during that period may maintain the H–1B nonimmigrant on the benefits provided to the nonimmigrant in his/her permanent work station (ordinarily the home country), and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers, *provided that* the employer affords reciprocal benefits treatment for any U.S. workers (*i.e.*, allows its U.S. employees, while working out of the country on a temporary basis away from their permanent work stations in the United States, or while working in the United States on a temporary basis away from their permanent work stations in another country, to continue to receive the benefits provided them at their permanent work stations). Employers are cautioned that this provision is available only if the employer's practices do not constitute an evasion of the benefit requirements, such as where the H–1B nonimmigrant remains in the United States for most of the year, but briefly returns to the ''home country'' before any 90-day period would expire.

(C) Where an H–1B nonimmigrant is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated that the worker will likely remain in the U.S. more than 90 consecutive days), the employer may maintain the H–1B nonimmigrant on the benefits provided in his/her home country (*i.e.*, ''home country benefits'') (and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers) *provided that* all of the following criteria are satisfied:

(*1*) The H–1B nonimmigrant continues to be employed in his/her home country (either with the H–1B employer or with a corporate affiliate of the employer);

(*2*) The H–1B nonimmigrant is enrolled in benefits in his/her home country (in accordance with any applicable eligibility standards for such benefits);

(*3*) The benefits provided in his/her home country are equivalent to, or equitably comparable to, the benefits offered to similarly employed U.S. workers (*i.e.*, are no less advantageous to the nonimmigrant);

(*4*) The employer affords reciprocal benefits treatment for any U.S. workers while they are working out of the country, away from their permanent work stations (whether in the United States or abroad), on a temporary basis (*i.e.*, maintains such U.S. workers on the benefits they received at their permanent work stations);

(*5*) If the employer offers health benefits to its U.S. workers, the employer offers the same plan on the same basis to its H–1B nonimmigrants in the United States where the employer does not provide the H–1B nonimmigrant with health benefits in the home country, or the employer's home-country health plan does not provide full coverage (*i.e.*, coverage comparable to what he/she would receive at the home work station) for medical treatment in the United States; and

(*6*) *the* employer offers H–1B nonimmigrants who are in the United States more than 90 continuous days those U.S. benefits which are paid directly to the worker (*e.g.*, paid vacation, paid holidays, and bonuses).

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.*, recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(4) For *salaried employees*, wages will be due in prorated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that*, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.*, a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. An employer that is a school or other educational institution may apply an established salary practice under which the employer pays to H–1B nonimmigrants and U.S. workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, *provided that* the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment and the application of the salary practice to the nonimmigrant does not otherwise cause him/her to violate any condition of his/her authorization under the INA to remain in the U.S.

(5) For *hourly-wage employees*, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (*e.g.*, weekly) but in no event less frequently than monthly.

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H–1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant ''enters into employment'' with the employer.

(i) For purposes of this paragraph (c)(6), the H–1B nonimmigrant is considered to ''enter into employment'' when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H–1B nonimmigrant has not yet ''entered into employment'' with the employer (as described in paragraph (c)(6)(i) of this section),

the employer that has had an LCA certified and an H–1B petition approved for the H–1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H–1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H–1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) *Wage obligation(s) for H–1B nonimmigrant in nonproductive status.*

(i) *Circumstances where wages must be paid.* If the H–1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of ''part-time employment,'' the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS and incorporated by reference on the LCA. If the I–129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H–1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H–1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.* If an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(8) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(9) ''Authorized deductions,'' for purposes of the employer's satisfaction of the H–1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (*i.e.*, paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (*e.g.*, income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or

is reasonable and customary in the occupation and/or area of employment (*e.g.*, union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.), except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer, *e.g.*, preparation and filing of LCA and H–1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H–1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this ''benefit of employee'' standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at worksite in ''on call'' status));

(C) Is not a recoupment of the employer's business expense (*e.g.*, tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer (*e.g.*, preparation and filing of LCA and H–1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (*i.e.*, paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H–1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H–1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that *liquidated damages* are amounts which are fixed or stipulated by the

parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties, and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.*, the percentage of the employment contract completed). (*See, e.g., Vanderbilt University* v. *DiNardo*, 174 F.3d 751 (6th Cir. 1999) (applying Tennessee law); *Overholt Crop Insurance Service Co.* v. *Travis*, 941 F.2d 1361 (8th Cir. 1991) (applying Minnesota and South Dakota law); *BDO Seidman* v. *Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999); *Guiliano* v. *Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999); *Wojtowicz* v. *Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (Colo.Ct.App. 1998); *see generally*, Restatement (Second) Contracts § 356 (comment b); 22 Am.Jur.2d Damages §§ 683, 686, 690, 693, 703). In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty. (Note to paragraph (c)(10)(i)(C): The $500/$1,000 filing fee under section 214(c)(1) of the INA can never be included in any liquidated damages received by the employer. *See* paragraph (c)(10)(ii), which follows.)

(ii) *A rebate of the $500/$1,000 filing fee paid by the employer under Section 214(c)(1) of the INA.* The employer may not receive, and the H–1B nonimmigrant may not pay, any part of the $500 additional filing fee (for a petition filed prior to December 18, 2000) or $1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H–1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the $500/$1,000 filing fee (*see* paragraph (c)(10)(i) of this section). If the filing fee is paid by a third party and the H–1B nonimmigrant reimburses all or part of the fee to such third party, the employer shall be considered to be in violation of this prohibition since the employer would in such circumstances have been spared the expense of the fee which the H–1B nonimmigrant paid.

(11) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H–1B and other immigration programs, if willful).

(12) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(13) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(9)(iii) of this section.

(d) *Enforcement actions.* (1) In the event of an investigation pursuant to

subpart I of this part, concerning a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or insufficient to determine the prevailing wage (e.g., does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment Service complaint system (see paragraph (d)(2), which follows), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (See 20 CFR part 658, subpart E.) Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office which services the State in which the place of employment is located (see § 655.721 for the ETA regional offices and their jurisdictions). Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

[65 FR 80214, Dec. 20, 2000]

§ 655.732 What is the second LCA requirement, regarding working conditions?

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of